INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement of facts	3
Summary of argument	5
Argument	9
I. The district court's findings that the dominant reason why the Company provided the trip was to confer a benefit upon petitioner and that petitioner took the trip primarily for pleasure rather than for business reasons are not clearly erroneous	11
II. On the facts found by the district court, the cost of the trip would not have been deductible by petitioner if paid by him	22
III. The value of a trip paid for by an employer primarily to confer a benefit upon an employee is includible in the employee's gross income	36
IV. The value of the wife's trip is taxable even if the value of the husband's is not	52
Conclusion	56
Appendix	61

CITATIONS

Cases:	
Alabama-Georgia Syrup Co. v. *Commissioner*, 36 T.C. 747	46, 53
Basse v. *Commissioner*, 10 T.C. 328	53
Bingham's Trust v. *Commissioner*, 325 U.S. 365	32
Campbell v. *Commissioner*, decided June 8, 1961 (T.C.)	54
Chandler v. *Commissioner*, 119 F. 2d 623	46

Cases—Continued

	Page
Commissioner v. *Duberstein*, 363 U.S. 278	5, 11, 14, 15, 27, 38, 48, 59
Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426	8, 40, 41, 42, 43, 44, 45, 46, 49, 52
Commissioner v. *LoBue*, 351 U.S. 243	42
Commissioner v. *Smith*, 324 U.S. 177	42
Comstock v. *Group of Investors*, 335 U.S. 211	58
Dean v. *Commissioner*, 187 F. 2d 1019	46
Duncan v. *Commissioner*, 30 T.C. 386	53, 54
Eisner v. *Macomber*, 252 U.S. 189	41, 43, 44, 49
Faitoute Iron & Steel Co. v. *Commissioner*, 11 B.T.A. 818	53
General Investors Co. v. *Commissioner*, 348 U.S. 434	41
Guglielmetti v. *Commissioner*, 35 T.C. 668	53
Heyward v. *Commissioner*, 36 T.C. 739	46
James v. *United States*, 366 U.S. 213	42
Kornhauser v. *United States*, 276 U.S. 145	32
Moorman v. *Commissioner*, 26 T.C. 666	53, 54
Moser v. *Commissioner*, decided February 11, 1959 (T.C.)	54
Patterson v. *Thomas*, 289 F. 2d 108, certiorari denied, 368 U.S. 837, petition for rehearing filed December 5, 1961, No. 109, this Term	5, 59
Peacock v. *Commissioner*, 256 F. 2d 160	47
Peurifoy v. *Commissioner*, 358 U.S. 59	60
Richards v. *Commissioner*, 111 F. 2d 376	47
Sheldon v. *Commissioner*, decided February 19, 1962 (C.A. 7)	54
Silverman v. *Commissioner*, 253 F. 2d 849	53
Thomas v. *Commissioner*, decided March 14, 1939 (B.T.A.)	53, 59
United States v. *Kaiser*, 363 U.S. 299	15, 17
Vanderbilt v. *Commissioner*, decided December 23, 1957 (T.C.)	54
Walkup Drayage & Warehouse Co. v. *Commissioner*, decided June 25, 1945 (T.C.)	53
Washburn v. *Commissioner*, 5 T.C. 1333	49

Statutes: Page

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.),
§ 22(a) 40, 42
Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):
§ 61 ..... 2, 3, 10, 39, 42, 49, 61
§ 74 49
§ 102 14
§ 104 49
§ 119 47
§ 161 ..... 3, 61
§ 162 ..... 2, 3, 10, 24, 31, 32, 33, 61
§ 212 32
§ 262 ..... 3, 31, 33, 62
§ 7805(b) 24
§ 7807 24

Miscellaneous:
Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81 14
H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75 32
H. Rep. No. 1337, 83d Cong., 2d Sess. 42, 49
Lowndes, *Federal Taxation and the Supreme Court*, 1960 Sup. Ct. Rev. 222 15
Rev. Rul. 55-57, 1955-1 Cum. Bull. 315 54
Rev. Rul. 56-418, 1956-2 Cum. Bull. 93 54
Rev. Rul. 59-58, 1959-1 Cum. Bull. 17 ..... 40, 47
S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 168, 178 ..... 42, 49
T. D. 6291, 1958-1 Cum. Bull. 63 24
Treasury Regulations 118, Sec. 39.22(a)-3 47
Treasury Regulations on Income Tax (1954 Code):
§ 1.61-1 ..... 3, 47, 62
§ 1.61-2 ..... 3, 47, 50, 62
§ 1.162-1 ..... 3, 63
§ 1.162-2 ..... 3, 24, 25, 26, 27, 29, 31, 53, 63
§ 1.262-1 ..... 3, 65
Treasury Regulations on Withholding Taxes, § 31.3401-(a)-1(b)(10) 39

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 78–81) is reported at 189 F. Supp. 2. The opinion of the court of appeals (R. 96–102) is reported at 291 F. 2d 841.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1961 (R. 103), and the petition for rehearing was denied on July 28, 1961 (R. 105). The petition for a writ of certiorari was filed on September 11, 1961, and was granted on November 13, 1961, 368 U.S. 913 (R. 106). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

An insurance company provided an all-expense paid trip from Dallas, Texas, to New York City for those of its insurance agents (including petitioner) who had sold prescribed amounts of insurance during the year, together with their wives. The district court found that the company's primary reason for providing the trip, though in the form of a "convention," was to confer an additional benefit upon the agents who met the sales quota. It further found that the primary reason petitioner and his wife took the trip was for personal pleasure. The questions presented, of which only the first appears to be in dispute, are:

1. Were the findings of the district court concerning the reasons for the trip, affirmed by the court of appeals, clearly erroneous?

2. If, as the district court found, the trip was given to petitioner by the company primarily for the purpose of conferring a benefit upon him, is the fair market value of the trip "income" to petitioner within the meaning of § 61(a) of the Internal Revenue Code of 1954?

3. If, as the district court found, petitioner took the trip primarily for purposes of personal pleasure, and the value of the trip is included in his income, is he entitled to an offsetting deduction for the (attributed) cost of the trip as an "ordinary and necessary" business expense under § 162(a) of the Code?

STATUTES AND REGULATIONS INVOLVED

Sections 61, 161, 162, and 262 of the Internal Revenue Code of 1954 and Treasury Regulations on Income Tax (1954 Code), Sections 1.61–1, 1.61–2, 1.162–1, 1.162–2, and 1.262–1 are printed in part in the Appendix, *infra*, pp. 61–66.

STATEMENT OF FACTS

The petitioner[1] is an insurance agent selling for Southland Life Insurance Company. During 1956, he was a resident of Dallas, Texas, where the home office of the Company was located.

In 1956, petitioner qualified to attend the Company's convention in New York City with his wife by selling the amount of insurance set by the Company. The sales requirements for qualification were announced by the Company in advance (R. 91–95), and the names of the salesmen qualifying were reported in a monthly magazine sent to all agents (R. 41). Of the approximately one-third of the Company's agents in its Ordinary Division who met the qualification standard (R. 60), all but 10 or 12 attended (R. 59–60). No award was made in lieu of the convention trip to those who did not attend (R. 32, 46). Petitioner attended the convention with his wife.

The agents and officers attending the convention (totaling, with their wives, 293 persons) traveled to and from New York City on special trains and were provided with rooms at the Waldorf-Astoria Hotel

[1] C. J. D. Rudolph will, for convenience, be referred to as the sole petitioner. His wife is a party only because a joint return was filed.

(R. 25, 28, 87). The group left Dallas at 9:30 P.M. Tuesday, December 11, 1956, and returned to Dallas on Tuesday, December 18. They were in New York City from late afternoon on Thursday, December 13, until Sunday morning, December 16 (R. 83–86). The schedule in New York City provided for a business session at 9:30 A.M. Friday, December 14, followed by a luncheon at which an address was given by Dr. Norman Vincent Peale on "Success Through Right Thinking." The rest of the convention schedule consisted of sight-seeing tours of New York City, a breakfast and fashion show for the wives, the special Christmas show at Radio City Music Hall, and an evening at the Copacabana night club. The Company provided coupons for tours of the Empire State Building, Rockefeller Center, and National Broadcasting Company and offered a limited number of tickets for live radio and television shows (R. 83–86). The rest of the program was free time which petitioner and his wife devoted to their own enjoyment (R. 37–39, 79, 83–86).

The value of the all-expense paid trip from Dallas to New York City, taken by petitioner and his wife and paid for by the Company, was $560. Petitioner and his wife failed to report this amount on their joint income tax return for 1956, and the Commissioner assessed a deficiency in income tax in the amount of $126.90, which then was paid with interest (R. 78).

In the subsequent suit for refund, the district court held that the trip had been earned by the taxpayer, was in the nature of a bonus, reward, and compensation for a job well done, and that, as compensation,

the $560 value of the trip properly was included in the income of the petitioner and his wife. The district court further found that, for petitioner and his wife, the trip was primarily a pleasure trip in the nature of a vacation, and hence its cost, once attributed to them as income, was a personal expense for which they were not entitled to an offsetting deduction (R. 80–81). The findings are quoted at length at pp. 12–13 of the Argument, *infra*.

The court of appeals (Judge Brown dissenting) affirmed, *per curiam*, upon the facts set forth in the opinion of the district court and upon the basis of the legal principles set forth in its opinion in *Patterson* v. *Thomas*, 289 F. 2d 108, certiorari denied, 368 U.S. 837, motion for leave to file petition for rehearing filed December 5, 1961 (No. 109, this Term) (R. 96–102).

SUMMARY OF ARGUMENT

1. The district court expressly found as a fact that the primary reason why the Company paid for the trip to New York for petitioner and his wife was to confer a benefit upon him because of his past services (specifically, selling the prescribed amount of insurance). It also found that the primary reason petitioner took the trip was for his (and his wife's) personal pleasure. It was on precisely that kind of question of fact—the reasons motivating human conduct—that this Court in *Commissioner* v. *Duberstein* emphasized the "primary weight" to be given to the trial court's findings and the necessarily "quite restricted" scope of appellate review. Additionally,

since those findings were affirmed by the court of appeals, they are clothed here with the additional weight this Court has given to the concurrent findings of two lower courts. Finally, the district court's ultimate findings of motivation are in any event a more than permissible inference from the facts, *inter alia*, that the agents invited on the trip were those who had sold prescribed amounts of insurance; that the nature of the trip, its desirability, and the sales quota that had to be met to be eligible for it were all announced in advance; that the so-called "convention", like those of prior years held in such places as Havana and Mexico City, was held at a place far removed from the Company's home territory and noted for its tourist attractions; and that but one morning of the two-and-a-half day stay in New York was devoted to a "business" meeting, with the balance of the time being occupied by entertainment and social events. Those findings, not "clearly erroneous," are binding here.

2. If petitioner would have been entitled to deduct the cost of the trip had he paid for it himself, the question whether the value of the trip, paid for by his employer, was "income" to him would not be reached, since he would be entitled to an offsetting deduction in any event. On the district court's finding that petitioner took the trip primarily for reasons of personal "pleasure", however, he plainly could not have deducted the cost as an "ordinary and necessary" business expense. Petitioner does not disagree, but, to the contrary, expressly acknowledges that the "ultimate issue" on the deduction question is his

"dominant motive and purpose" for going—did he go "primarily for reasons of business or personal pleasure?" (Br. 36).

Challenging the district court's findings, however, petitioner asserts that the Company "expected" the agents invited to attend and that he was therefore induced to go by fear of otherwise jeopardizing his position. In addition to the rejection of petitioner's factual premise by the district court, his legal premise—that whatever the employer demands as a condition of continued employment is *per se* an "ordinary and necessary" business expense—is too broad to be sustainable. In the world of the "organization man" to which the dissenting opinion below refers, there are many things one may "have" to do to keep his job that are nevertheless not deductible: dress well, live in the proper neighborhood, entertain graciously, etc. That an employer would look with displeasure upon an employee who declined an offer to participate in the corporate "family" fun does not, of itself, convert the cost of an otherwise "pleasure" trip into an "ordinary and necessary" business expense. The expense may be "necessary" in a but-for sense, but it does not bear to the business the *kind* of relationship that the term "ordinary" additionally requires.

Petitioner further asserts that, while the formal business session occupied but a small part of the time in New York, the informal talk with the other agents and officers during the train trip and the social gatherings was also of educational value and was a further "business" reason for his going on the trip. Again, however, the district court found that not to have been

petitioner's reason for going, so that the claim falls even if we assume (which, however, we deny) that informal "shop talk"—as much a part of the life as of the business of the professional man—is to be deemed an "ordinary and necessary" business activity to which tax significance should be attached.

3. Since the cost of the trip would not have been deductible by petitioner if paid for by him, the Company's provision of the trip specifically for the purpose, as the district court found, of conferring a reward upon the agents who sold the required amount of insurance constituted "income" to petitioner in the nature of "compensation." Petitioner initially suggests, though he soon abandons the contention, that since the value of the trip could be realized only by the taking of it, and hence had no "transferable" value, its receipt in kind is not within the definition of "income." The contention that what must be consumed is not in its "nature" income is refuted not only by this Court's rejection in *Glenshaw Glass* of such a conceptualistic approach to gross income problems, but by petitioner's own acknowledgment that the value of meals and lodging furnished by an employer for the benefit of an employee—which are equally realizable only by consumption—are taxable as income. A vacation trip furnished by an employer for the benefit of his employees is no less income.

Petitioner ultimately abandons the argument that his receipt was not in its nature income by adding the limitation, "if not intended as compensation," which he also acknowledges refers to the employer's reasons for providing the trip. Thus his argument, initially

clothed as one of definition, reveals itself again as simply an attack upon the district court's findings. Since the district court found that the very reason the Company provided the trip in this case was to confer a benefit upon petitioner because of his past services—*i.e.*, what is meant by an "intent to compensate"—that finding establishes that the value of the trip was income to petitioner even under his own statement of the controlling question.

The petition for certiorari in this case was presumably granted because it purported to present questions turning on the definition of "income" and of "ordinary and necessary" business expenses. Should the Court agree with us, however, that all of petitioner's arguments ultimately reduce themselves to simply an attack upon the district court's findings, it will have no occasion to consider or decide the questions of definition latent in petitioner's view of the facts. Rather, the judgment below may properly be affirmed on the ground simply that the findings of the district court of the reasons for the trip—concededly the ultimate and controlling facts—are not clearly erroneous (or, under the two-court rule, are not open here).

ARGUMENT

The Southland Life Insurance Company sponsored and paid for a trip from Dallas, Texas, to New York City for 151 of its agents, officers and employees, plus their wives. Of the two and a half days spent in New York, one morning was devoted to a business session

and the balance of the time was devoted to various forms of entertainment. The agents selected for the trip—about one third of the total number of agents for the Company—were those who met previously-announced sales quotas. Petitioner, having sold the required amount of insurance during the preceding year, participated in the trip with his wife.

The ultimate question presented is whether petitioner was taxable on the value of the expense-paid trip for himself and his wife. That question turns upon two subordinate questions: (1) whether the value of the trip was includible in petitioner's "gross income" under § 61(a) of the Code; and (2), if so, whether petitioner was entitled to an offsetting business-expense deduction under § 162(a) (*i.e.*, viewing the case as though the Company had paid petitioner an equivalent amount in cash and he had paid for the trip himself).

On neither question do we believe there is any substantial dispute between the parties as to the governing legal standards. Petitioner's real quarrel is with the findings of the district court and the main thrust of his argument here, although not styled as such, is that those findings should be set aside as "clearly erroneous." Both because the factual question seems to be the main point in issue and because the facts relevant to both legal questions are substantially the same, we shall consider first the district court's findings and show not only that they are not clearly erroneous, but that any other findings would have been wrong. We will then show—though we do not think

petitioner really disputes it—that if those findings are accepted it necessarily follows that the value of the trip was neither excludible nor deductible by petitioner. Finally, we will show briefly the additional reasons why the value of his wife's trip is taxable even if the value of petitioner's own trip is not.

I

THE DISTRICT COURT'S FINDINGS THAT THE DOMINANT REASON WHY THE COMPANY PROVIDED THE TRIP WAS TO CONFER A BENEFIT UPON PETITIONER AND THAT PETITIONER TOOK THE TRIP PRIMARILY FOR PLEASURE RATHER THAN FOR BUSINESS REASONS ARE NOT CLEARLY ERRONEOUS

Both parties are agreed that the relevant ultimate facts upon which the legal questions in this case turn are (a) the reasons why the Company sponsored and paid for the trip and (b) the reasons why petitioner and his wife took the trip offered by the Company. The question of fact, that is, is one of causation or motivation and is of the same character, as petitioner also acknowledges (Br. 25), as the question of ultimate fact held controlling for purposes of the "gift" exclusion in *Commissioner* v. *Duberstein*, 363 U.S. 278, 286:

> * * * the proper criterion * * * is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. * * *[2]

---

[2] The "why" rather than the "what," and thus perhaps more properly described as "motive" rather than "intent." As the Court noted in *Duberstein*, however, it matters little what label is used so long as the nature of the inquiry is clear.

It is, accordingly, for the motivating reasons for the Company's and the petitioner's actions that the district court's findings and the evidence are to be examined.

1. There is no question in this case of what the district court found; the findings, incorporated into the court's opinion, are clear and present no questions of interpretation. The relevant excerpts from the opinion are (R. 80–81):

> * * * But what business reason is there for holding a convention in a place as far away as New York; and certainly, what business reason is there for holding a convention in Havana, Cuba [a prior year's convention site]. It was not held down there for educational purposes in insurance.
>
> Assume that it was to a degree; what was the primary purpose of the trip? It was a reward, or a bonus given to the employee for excellence in service. * * *
>
> All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious, magnanimous thing of awarding those leading agents a trip just as much as if it had awarded them an automobile * * *.
>
> The Court's conclusion is that the holding of these conventions generally, and especially the holding of them at remote places, have the primary purpose of affording a pleasure trip which the agent himself, to enjoy, would have paid out of his own funds if the company had not given it to him, which is in every way in the nature of a reward that would be a bonus.

> * * * the primary purpose of it [a trip given employees in a hypothetical example offered as an analogy] was to hold out an alluring reward to make them work harder. * * *
>
> Therefore, we conclude, that the trip was earned by [petitioner] and was in the nature of a bonus, reward, and compensation for a job well done. * * *
>
> Further, since the trip was primarily a pleasure trip in the nature of a vacation, its cost is personal to the husband and wife and therefore not deductible by them.

The findings as to the Company's reasons, in short, were that the "primary" (if, indeed, not the only) reason for the Company's providing the trip was to confer a benefit upon the employees meeting the production quotas and to provide an inducement for them to "work harder" in order to qualify for the benefit. To petitioner, in turn, the trip was "primarily a pleasure trip in the nature of a vacation," to enjoy which he would have paid himself if the Company had not given it to him. The primary reason for taking the trip was the pleasure and enjoyment of himself and his wife.

2. It is upon the validity of those findings, as we will show, that this case turns. While petitioner does not formulate his argument as an attack upon the findings as such, at every crucial point of the argument his premise, expressed or implied, is that the Company provided the trip, or the petitioner took it, for reasons other than those found by the district court. If the findings stand, petitioner's argument must fall, and the case thus reduces itself to the

question whether those findings are "clearly erroneous."

Just as in *Commissioner* v. *Duberstein*, *supra*, the question of ultimate fact in this case—the final factual inference remaining to be drawn even from undisputed basic facts—is one of the motivation of human actors, the "reasons" that "explain" their conduct. Thus the broad deference which the Court there emphasized should be given to the trial court's findings on such a basic aspect of human behavior is fully applicable here. In making an inference on a matter so elusive and subjective as motivation, the Court stressed, the trier of fact cannot be restricted to any single factor but is to consider "all the factors" and, to the "multiplicity of relevant factual elements," bring to bear his own "informed experience with human affairs" and with "the mainsprings of human conduct" (363 U.S. at 288, 289, 292). From the nature of the inquiry, and the variety of elements relevant to its resolution, it follows as a corollary that, on such questions, "primary weight" is to be given to the trial court's findings and appellate review "must be quite restricted" (363 U.S. at 290–291). It is with that gloss upon the "clearly erroneous" standard, as applied to a question of motivation of the sort involved here,[3] that a consideration of the evi-

[3] We may note our disagreement with those who have read the quoted parts of the *Duberstein* opinion as referring, not simply to the question of motivation, but to the ultimate question, without separation of law and fact, whether a transfer is a "gift" within the meaning of § 102 of the Code. See Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 88–91; Lowndes, *Federal Taxation and the Supreme Court*, 1960 Sup. Ct. Rev. 222, 234. The

dence supporting the findings here must be approached.

Court was there speaking only of the scope of review of the findings of fact, including "factual inferences." What the ultimate factual inference was, in turn, the Court had already taken care to spell out. The "proper criterion," the Court had said, "is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer" (363 U.S. at 286). Once the reason for the transfer was found, there remained the further question—necessarily one of law, for otherwise the statutory term "gift" could not have been defined—whether the reason found was one making the transfer a gift or not a gift. The Court itself made that very distinction, not only in *Duberstein* but also in the companion case, *United States* v. *Kaiser*, 363 U.S. 299. Thus in *Duberstein* the Court stated as a matter of law the reasons which, if found, make the transfer a gift (*e.g.*, "affection, respect, admiration, charity or like impulses") and those which, if found, make it not a gift (*e.g.*, "anticipated benefit" to the transferor) (363 U.S. at 285). In *Kaiser*, in turn, the Court affirmed a jury finding of a gift only after concluding that the jury could properly have found that the payments were made for a reason which *the Court* considered to be a gift reason ("generosity or charity") (363 U.S. at 304). And it hardly needs adding that, while a trier of fact's familiarity with the "mainsprings of human conduct" will no doubt tell him a good deal about the motivation of a board of directors or, as here, of an insurance agent, it is hardly likely to tell him anything about the meaning of the term "gift" in the Internal Revenue Code. Thus the commentators' attribution to the Court of a purpose to include the question of definition itself within the fact-finder's function seems to us quite unwarranted. Accordingly, we rely upon the re-emphasis in *Duberstein* of the limited scope of review of findings of ultimate fact only as to the similar question of ultimate fact in this case—the Company's reasons for providing the trip and petitioner's reasons for taking it. We do not rely upon a limited scope of review of the further question whether a trip given for those reasons constitutes "gross income" or whether the reasons for which it is taken constitute "business" reasons qualifying the cost for deduction.

One implication of *Duberstein* that is particularly pertinent here is that the trier of fact, in making a judgment on the subtle and elusive forces motivating conduct, is not bound to accept, as petitioner seems to assume in his brief, all oral testimony offered by a taxpayer that is not specifically contradicted by oral testimony for the government. He may, for example, properly conclude that one or two contemporaneous expressions of purpose are entitled to greater weight than the testimony of a multitude of witnesses, all interested in the outcome, attempting to recreate, with a new awareness of its significance, an articulation of aims and motives that tend inevitably to gain or lose much in the telling.[4] Or, again, he is entitled to have

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[4] For example, Kenneth B. Skinner, company vice-president and agency director, testified at the trial of the present case that the trip was not intended as an award or prize and further stated (R. 46):

> The purpose of the convention was to have the opportunity or method of communications to our sales force as to the company's objectives and plans, and the exchange of ideas in the methods of successfully selling life insurance.

However, in his letter of welcome, printed in the convention brochure, Mr. Skinner stated to the qualifying agents (Tr. 39 (unprinted)):

> Every phase of this New York Convention trip was planned with your pleasure in mind. Our aim is to express in some measure our appreciation of you and the work you are doing. Our only request is that you ENJOY YOURSELF.

In another letter of greeting in the brochure, Dan C. Williams, president, similarly stated (Tr. 38 (unprinted)):

> May you find this 1956 Agency Convention rewarding—well worth the considerable investment of yourself which the earning of it demanded.

a healthy scepticism of the "business" reasons for holding "conventions" for Texas-based insurance agents in Havana or New York City. As the Court said in *Duberstein*, that is just "the sort of informed experience with human affairs that fact-finding tribunals should bring to this task", and conclusions so based are not to be set aside as "mere suspicion[s]" (363 U.S. at 292).

Turning to the affirmative evidence supporting the findings, it is, we submit, more than ample to justify—if not require—the court's conclusion that the Company sponsored the trip, not for instructional or other independent business reasons, but solely, or at least primarily, in order to confer a benefit upon qualifying agents, and that the petitioner in turn accepted the trip primarily because of the enjoyment and pleasure it offered. The convention—like those of other years held by the Company in Canada, Mexico City, Havana, Colorado and California (R. 34, 49)—was held at a prime tourist area far removed from the Company's usual area of business.[5] An expense-paid trip to such a location, with a minimum of nominal business activities and a maximum of free time to enjoy the attractions offered in the area in and of itself strongly suggests that both the giver and the receiver have the pleasure of the receiver as their

[5] With but a single morning session and lunch being devoted to business, it is difficult to take seriously the suggestion that it was necessary to hold conventions outside the Company's home territory because otherwise agents might devote time to their own business rather than attend to convention business (R. 44, 62).

primary object.[6] That the agents' wives were included in the annual "conventions," held at far-away places equally attractive to them, adds strong support to the inference.

The selection of the agents offered the trip was based upon their selling prescribed amounts of insurance or producing stated amounts of premiums, the requirements being announced in advance to permit increased sales activity to meet them (R. 42, 49, 91–95). With the terms of the competition having been set, the advantages of qualifying under them were repeatedly emphasized, with appropriate publicity being given to those who had satisfied the sales requirements (R. 41). Wives were made aware of the trip possibilities for themselves, so they could encourage their husbands to make the necessary effort to qualify (R. 41). That holding out of the trip as a

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[6] Petitioner is in error in suggesting that the government does not question the bona fides of the convention (Br. 7), citing page 67 of the Record. The reference is apparently to the statement by government counsel that:

> One further reason for my objection is, as I stated before, we are not challenging the bona fides of this production [deduction?] to the insurance company; that is not an issue and any evidence on that matter is irrelevant to our issue.

The word "production" seems an obvious mistranscription of "deduction," and it is true that we have never challenged the deductibility of the cost of the convention to the Company. That is so, however, only because it is deductible by the employer *either* as compensation paid *or* as an independent business expense. We do challenge the "bona fides" of the convention to the extent that the "convention" label implies that the primary purpose of the occasion was anything other than to provide a pleasure trip for the employees.

reward to be earned was, we submit, clearly inconsistent with the explanation offered by petitioner (Br. 24) that the sales-volume method of selection was designed simply to single out the more successful agents who would most benefit from the convention. For that purpose, the prior announcement of the sales requirement as a goal towards which to strive would have been unnecessary. Additionally, the sale-volume test was utilized only for the Company's annual convention at resort cities; for the smaller educational meetings and schools reguarly held by the Company at its home office or in the field, attendance was determined rather on the basis of individual aptitude or need for the particular instruction (R. 58–59). There was, therefore, more than sufficient evidence to warrant the court's conclusion that the trip was, in fact, offered by the Company as a reward or prize in order to provide an inducement for increased sales efforts by the agents.

Petitioner, in turn, testified that he regarded the Company's program leading to the trip at least partially as an incentive in making sales (R. 41–42). He further testified that he read the "1956 Convention Qualification Rules" with interest and that he and his wife looked forward to and planned for the convention trip (R. 36). Clearly he regarded the trip as something desirable to be earned, rather than as a chore to be endured.

There remain, finally, the inferences to be drawn from the relative amounts of time spent during the trip on business and on entertainment activities. Of the two and a half days in New York, one morning

session (Friday, December 14), followed by a lunch, was devoted to a "business meeting" consisting of talks by Company officials, an agents' panel discussion, and an address, at the luncheon, by Dr. Norman Vincent Peale. The rest of the time in New York was given over to either Company-arranged entertainment or free time. The Company-planned events included a sight-seeing trip en route to the Waldorf-Astoria on the afternoon of arrival (Thursday, December 13); another sight-seeing tour of Manhattan the following afternoon; a breakfast and fashion show for the wives on Saturday, followed by the special Christmas show at Radio City Music Hall in the afternoon and an evening at the Copacabana night club for "dinner, dancing and floor show." For the free time, the Company provided tickets for radio and television shows and for various additional tours (R. 83–86).

Simply from the objective facts of the nature of the trip and the minimal amount of time devoted to the formal "business" session, the trial court was entitled to draw the inference that the Company did not spend $80,000 (R. 59) to transport 151 agents and officers, together with their 142 wives, from Texas to New York in order that they might spend three hours listening to talks given by Company officials also brought from Texas. Some more substantial reason must have been present, and that reason, the court properly inferred, was the purpose to confer, by the trip, additional benefits upon the agents who had exceeded the stated sales quotas.

It may be, as petitioner suggests, that there were some indirect benefits to the Company deriving from

informal exchanges among its agents and officers during the course of the train trip and the social or entertainment activities. Whether or not in theory such incidental benefits resulting from social functions provided for one's employees could qualify as a non-compensatory purpose, the record here would support only the barest inference that any significant amount of such exchanges in fact took place, even during the train trip upon which petitioner heavily relies (R. 29–30). And plainly, there is nothing in the record that requires the district court to believe, as he chose not to believe, that the anticipation of such benefits was a primary, or even significant, factor in the Company's decision to provide the trip.

Petitioner apparently suggests, finally, that it was clearly erroneous for the court to find that he took the trip for "pleasure" rather than from fear that failing to go would jeopardize his position or opportunities for advancement. Even assuming the relevance of "compulsion" in that sense, the record fully supports the conclusion that no such "compulsion" existed in any meaningful sense or that it was not in any event an operative factor in petitioner's decision to take the trip. While petitioner stated that he was "expected" to go, he declined to say that his non-attendance would have been "frowned upon" or cause him to be "dismissed" (R. 28). Nor does it appear that the ten or fifteen agents who, for one reason or another, chose not to attend suffered any recriminations (R. 59–60). The reason why petitioner took the trip was, rather, that eloquently expressed by him

when he testified that he would take it again "tomorrow" if offered the opportunity on an expense-paid basis (R. 43).[7]

In summary, on this record the only plausible explanation of the transaction is that the Company offered the trip as a reward or prize to stimulate increased sales activities by its agents and that the petitioner, having earned the right to the trip, accepted it because of the pleasure and enjoyment the taking of it was expected to afford. Any other benefits accruing from the trip either to the Company or to the petitioner were at most nominal, and the district court properly concluded that they played no significant part in the motivation either of the Company or of petitioner. Those findings of fact, affirmed by the court of appeals, are binding here.

II

ON THE FACTS FOUND BY THE DISTRICT COURT, THE COST OF THE TRIP WOULD NOT HAVE BEEN DEDUCTIBLE BY PETITIONER IF PAID BY HIM

Since the deductibility issue does not arise unless the value of the trip is first held to be includible in petitioner's gross income, it is perhaps more logical to consider first, as does petitioner, the gross-income question. Nevertheless, there are advantages of exposition in dealing first with the question of deducti-

[7] Moreover, at the time of the trip, petitioner had recently recovered from a cancer operation (R. 24, 37), and he decided to take the trip only after consulting his doctor (R. 33), circumstances that make it entirely implausible that any animus towards him would follow from his refraining from the trip.

bility, and we shall proceed in that order. The deduction question can be most sharply put by assuming that petitioner had paid for the trip (otherwise arranged by the Company) out of his own funds. If a deduction would be allowed in that case, then it follows as of course that petitioner is entitled to an offsetting deduction here if the value of the trip furnished by the Company is included in his gross income. He cannot be worse off when the Company gives him the trip in kind than he would be if it had increased his cash compensation in an equivalent amount and he had paid for the trip himself.

As we have said, we do not believe there is any dispute that the cost of the trip would not be deductible by petitioner if the Court accepts the findings of the district court that the primary reason the Company sponsored the trip, and petitioner took it, was the pleasure and enjoyment it would give to him and his wife. Petitioner acknowledges that the "ultimate issue" on the deduction issue "is the dominant motive and purpose of Petitioners in attending the convention. Did they attend primarily for reasons of business or personal pleasure?" (Br. 36). Petitioner asks the right question but of the wrong body. The question must be, and has been, answered by the trial court, and the answer there given, not clearly erroneous, is the end of the case. We will, nevertheless, go on to show that the facts found by the district court are, under the statute and regulations, the controlling facts and then point out the infirmities in petitioner's argument even on the facts as he assumes them.

1. The statutory basis for the deduction claimed is § 162(a):

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *.

The regulations[8] provide generally that only such traveling expenses "as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted," and that the expenses of a trip "undertaken for other than business purposes" will be deemed "personal" and nondeductible. Regs., § 1.162–2(a). The regulations also specifically recognize that the cost of attending a "con-

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[8] Treasury Regulations on Income Tax (1954 Code). Petitioner expresses some doubt whether the regulations under the 1954 Code, not promulgated until April 3, 1958, are technically applicable to this case, involving a 1956 tax year (Br. 30–31). The Treasury Decision promulgating the regulations (T.D. 6291, 1958–1 Cum. Bull. 63) describes them as being "for taxable years beginning after December 31, 1953," and since the power to make them prospective only (§ 7805(b)) was not exercised, they are applicable here. Little turns on the question, however, since the same result would be reached under the prior regulations—or, for that matter, under the terms of the statute itself.

Petitioner's reliance on § 7807, relating to stop-gap regulations, is misplaced. That provided simply for the continued applicability of the old regulations under any provision of the Code which "depends for its application upon the promulgation of regulations", and § 162(a) is not of that type.

vention or other meeting" may be deductible but emphasize that whether it is or not depends upon "whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance." Regs., § 1.162–2(d).[9] They add, somewhat unnecessarily, that no deduction is allowable if the convention "is for political, social or other purposes unrelated to the taxpayer's trade or business." *Ibid.*

The problem posed by trips that are taken for a combination of reasons—both business and personal—is specifically dealt with in § 1.162–2(b) of the regulations. That provides that if, on a trip, the taxpayer "engages in both business and personal activities," the travel expenses "to and from" the destination are deductible only if the trip is related "primarily" to business. If the trip is "primarily personal in nature," the "to and from" expenses are not deductible, though of course any expenses actually incurred at the destination that are allocable to the trade or business may independently be deducted.[10] The regulations further recognize that the question

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[9] Since the cost of attending conventions is admittedly deductible if the necessary business purpose is shown, petitioner's recitation of the numerous kinds of conventions for which deductions have been allowed (Br. 33–34) proves nothing. The issue here is whether *in this case* the "convention" was attended for business reasons, and the district court found it was not.

[10] There is no claim here of any such specific business expenses incurred at the destination, and the only question is whether the trip as a whole qualifies for deduction.

whether a trip is "primarily" related to business or is "primarily" personal is a question of fact, in the resolution of which the relative amounts of time spent on the trip in business and personal activities "is an important factor." § 1.162-2(b)(2).

The "primary" purpose test of the regulations, it may be seen, is not significantly different from this Court's suggestion in *Duberstein* that, in determining the "reason" for a payment for tax purposes (though there for purposes of the "gift" exclusion), in a context in which there may be mixed motives, it is the "dominant" reason that controls. The implications of that test, however, deserve a brief comment. In a case in which the business reasons are not only a necessary but a sufficient cause for the trip—*i.e.*, it would have been necessary to take the trip for the business reasons alone—it seems essentially irrelevant that the taxpayer also anticipates deriving pleasure from the trip. That is, when business necessities are alone a sufficient reason for a trip, they should be given "primacy," and there is no occasion for the courts (just as there was none for the taxpayer) to weigh the additional personal reasons that might have made the taxpayer happy, if not eager, to go.

The difficult case is the one in which the taxpayer has some business which he can further on the trip but would not take the trip for that reason alone. It is only because he can kill two birds with one stone—further his business and have a good time—that he considers the trip worth the cost. It is obvious that a taxpayer ought not be allowed to deduct

a $1000 trip because he sought and obtained a business advantage worth $100; yet it seems harsh to deny any deduction if the business advantage was worth most, but not quite all, of the cost of the trip (say, $800). In a perfect world, the conceptually ideal solution might be to determine the "worth" to the taxpayer both of the business benefits and of the non-business benefits and to allocate the cost accordingly. But such precision of measurement is a vain hope and the pragmatic necessities of the tax system require a blunter instrument. Thus the all-or-nothing solution adopted by the regulations and by this Court in *Daberstein*—total allowance or disallowance[11] depending upon which cause had the greater force in motivating the trip, though perhaps only by a narrow margin—seems the only feasible solution. And against the theoretical inequity of denying deduction of any part of the $1000 cost of the trip when the pleasure is afforded was subjectively "worth" to the taxpayer only, say, $700 (*i.e.*, that's all he would have paid for that reason alone), there can be offset the boon he realizes when he is allowed to deduct the full $1000 cost though the business advantage is worth only $700. In short, acknowledging the theoretical imperfections of the "primacy" test, it remains the only workable and practical solution to a

[11] Except, of course, for specific business expenses incurred at the destination, which are allowable even if the trip as a whole was "primarily" for personal reasons. We are concerned here only with the deductibility of the cost of the basic trip—the "to and from" expenses and meals and lodging. See Regs., § 1.162-2(b)(1).

problem not susceptible of precise or mechanical treatment.

On the question of whose motivation is controlling—the employer's or the employee's—there is again no substantial disagreement between the parties. Initially, as petitioner agrees (Br. 39), the question is necessarily why did the person claiming the deduction (the employee) incur the expense. Since, however, it is the "business" of an employee to further the interests of his employer, we agree with petitioner (Br. 39–40) that a purpose to advance his employer's interests is a business purpose as to the employee. Thus, since the reason an employer requests an expenditure will normally be to advance his (the employer's) interest, it is normally sufficient that an expense is incurred at the behest of the employer. The necessary limitation, of course, is that if the employer's purpose is to advance not his own interests but the employee's—*i.e.*, to confer a benefit upon the employee—the employee's participation in the endeavor of conferring a benefit upon himself can hardly be a business purpose as to him. If, as petitioner puts it (Br. 40), the employer's "business" purposes are to be "attributed" to the employee, so must his purpose to benefit the employer.

Upon the facts found by the district court in this case, the application of those undisputed legal standards poses no difficulty. The court specifically found that the Company's primary reason for sponsoring the trip was to confer a benefit upon petitioner as a reward for his sales efforts, a purpose which, even if "attributed" to petitioner, is plainly not a "business"

purpose as to him. Nor did petitioner have an independent business purpose of his own [12] in taking the trip, for the court specifically found that his primary reason for going was to further his own pleasure. While both the Company and the employee may have anticipated various other benefits from the trip in addition to petitioner's pleasure, it is the "primary" or the "dominant" reason for the trip that controls (Regs., § 1.162–2(b)), and those findings are thus conclusive of the issue. The trip having been "undertaken for other than business purposes" (Regs., § 1.162–2(a)), the cost of the trip is not deductible.

2. In the event that the district court's findings are to be set aside, either in whole or in part, it is necessary to go on to consider the questions raised by petitioner's view of the facts. Petitioner's main argument, contrary to the findings,[13] is that he was "compelled" to go on the trip, whether he liked it or not (Br. 41–44). Specifically, he asserts that the Com-

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[12] An employee may, of course, also have business expenses that are incurred, not to further his employer's interests, but to further his own interests as an employee, possibly antagonistic to his employer's. An example is union dues, which are deductible by the employee because incurred for his independent business objective of, *inter alia*, obtaining higher wages through collective bargaining. A trip to the home office to protest a severance notice might be in the same category. Or, in the context of this case, even though the Company provided the trip solely to confer a benefit on the agents, one of the agents might still be able to establish that he had an independent business reason for going to New York (*e.g.*, to close an important insurance sale).

[13] And, indeed, to petitioner's own testimony that he would go again "tomorrow" if offered the trip on an expense-paid basis (R. 43).

pany "looks with serious displeasure upon any agent or his wife who, without good reason, does not attend" (Br. 5); that, while not proclaimed as an "edict", the Company's implicit "command" that he attend was no less effectively conveyed by the "subtle" ways "of modern business"; and that failure to attend would place "his economic security and association with the Company in jeopardy" (Br. 43). Not showing up at the boss's party is, we acknowledge, not the best way to get ahead in the world, but we take it that petitioner implies a somewhat more direct relationship here between his attendance and his opportunities for advancement. And, while we deny it to be a fact, we will assume, for purposes of this discussion, that petitioner would in fact have lost his job had he not taken the trip. For, even so, we disagree with the legal significance petitioner would attribute to that fact.

At first sight, it might seem that nothing is more related to the "business" of being an employee than that which is, in the phrase quoted by petitioner from Judge Brown's dissent (Br. 43), "indispensable" to keeping the job. Reflection, however, reveals the deficiencies of that "but for" reasoning. In what petitioner calls "the ways of modern business" (Br. 43), there are many things that it may be essential to do to keep one's job: dress well, belong to the right club, live in an expensive neighborhood, entertain generously, or go on hunting trips with the boss. The extent to which the "corporation" sometimes impinges upon and controls the private life of the "organization man" is, indeed, emphasized in Judge Brown's dis-

senting opinion in the *Thomas* case (see petition for certiorari, pp. 64–70). With but slight extension, therefore, the implicit premise that whatever the corporation demands the employee may deduct could readily be applied to substantially all personal and living expenses. Plainly that cannot be the law. One cannot deduct commuting expenses because his employer requires him to come to work (and go home to sleep) to keep his job (Regs., § 1.162–2(e)); the cost of his expensive clothing because his employer requires him to dress well; the cost of being active in community affairs because his employer expects it of him; the cost of a trip to Bermuda because his employer insists that he take his vacation away from the tribulations of home life, the better to perform his work upon return; or the cost of food or shelter because one must eat and sleep to work. So plain, indeed, is the error in petitioner's but-for reasoning, that the problem is not to prove it wrong but to suggest how the obviously necessary limitation on "ordinary and necessary" business expenses is to be drawn.

There are two approaches to answering petitioner's syllogism. The first is to say that, even if such expenditures would otherwise qualify for deduction under § 162, they are made nondeductible by § 262, which directs that:

> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

The other, and more direct, approach is to say that simple but-for causation does not *per se* mean that an expense is "ordinary and necessary" within the

meaning of § 162. The expense, this Court has said, must bear a "direct and proximate" relationship to the business.[11] While "direct" may imply no more than the immediacy of the casual relationship, "proximate" suggests that the question turns also on the *kind* of relationship, and some qualification of that sort is obviously essential. It is not enough that an expenditure is essential to one's business in a but-for sense; it must also contribute to the business objective in a certain way. The statutory warrant for such a limitation is to be found in the restriction of deductions to "ordinary and necessary" expenses: that an expense is "necessary" is not, as petitioner assumes, the only test; it must also be "ordinary", a test which implies that not any kind of business relationship is adequate.

Admittedly, what kind of business relationship is necessary to qualify an expense for deduction is not a question to be answered by a neat formula. The question is one for the exercise of "judgment," guided by little more than the necessities of an equitable,

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[11] See *Kornhauser* v. *United States*, 276 U.S. 145, 153; *Bingham's Trust* v. *Commissioner*, 325 U.S. 365, 370, 374. In reporting the substantially equivalent provision adopted in 1942 (now § 212) permitting deduction of "ordinary and necessary expenses" incurred "for the production or collection of income" (*i.e.*, by persons not technically engaged in a "trade or business"), the House committee report similarly observed that, to be deductible, the expenses "must be ordinary and necessary * * * and must bear a reasonable and proximate relation to the production or collection of income * * *." H. Rep. 2333, 77th Cong., 2d Sess., p. 75.

pragmatic, and workable tax structure, and the line can be pieced out only by the case-by-case process of inclusion and exclusion. For present purposes, however, it is sufficient to say—whether derived from § 262 or from an interpretation of § 162—that "personal" and "living" expenses are not made deductible by the fact that nature or one's employer requires that they be incurred in order to keep one's job. As we have previously suggested, if an employer "orders" an employee to go to Bermuda for a needed rest, the better to perform his job on his return, the "vacation" remains a nondeductible "personal" expense notwithstanding that he would have lost his job had he not taken the trip. By the same token, the fact that petitioner's employer in effect "ordered" him to go to New York (even if true) is not *per se* a basis for deduction. It remains a "personal" expense if the employer arranged the trip primarily for the pleasure of the agents and if, apart from the alleged compulsion, petitioner had no independent business reasons for going. "Compulsion" as such is not the key to deductibility.[15]

3. Petitioner also asserts that one of the reasons he took the trip was the opportunity it offered for informal exchanges with other agents and officers about

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[15] That is not to deny that the fact that an employer "requires" a thing to be done is relevant for the light it casts upon the employer's reasons for wanting the act done—*i.e.*, whether it is true or not that the employer's primary interest was in the benefit to the employee. For that purpose, however, it is of only evidentiary value. The question discussed here is whether the fact of "compulsion" has, in itself, any controlling legal significance.

the life insurance business (Br. 39–41). He contends that that was as much a business reason as the instruction to be derived at the formal business meeting and that it gave a "business" character to the entire trip—the train ride and the nominally "entertainment" events as well as the business meeting. While the factual premise of that argument is undermined by the finding of the district court that personal pleasure was the primary reason for the trip, we wish briefly to comment also upon its legal premise—namely, that an opportunity to talk to fellow laborers in an informal or social context qualifies, because of the incidental educational benefits of such discussions, as a "business" objective.

Petitioner makes no bones about the sweep of his suggestion. As he says, "When lawyers get together they talk law; when doctors get together they talk medicine; when insurance men get together * * * they talk insurance" (Br. 40). We may grant, and our wives will confirm, that that is true. But the question is whether that is enough to convert an otherwise social event into a business one. "Shop talk" is a part, not of the business, but of the life, of the professional man. Granted that one may learn something valuable from such contacts, ought the tax law attempt to take account of such incidental benefits to one's business? Taxation is a practical matter, and to attempt to separate out and attach tax significance to every element of business advantage accruing from the process of living—in a world in which life and business are often inextricably woven together—is a vain hope. Here again, there is no denying that there is *a*

relationship of the activity to the business, and the question is whether it is of the kind that should be deemed "ordinary" or "proximate" or "direct"—all of which are, in the end, but labels for an essentially pragmatic judgment whether it is consistent with the ends of an equitable and workable tax system to recognize such a relationship as a "business" one and thereby give tax significance to its presence.

In our judgment, "shop talk" should be recognized as a "business" activity only when it is formally organized and channelled, as at formal meetings, round-table discussions, conferences, training sessions, and the like. Beyond that, the task of sorting out the business from the social is hopeless, for the simple reason that "shop talk" is in fact all-pervasive. Our position, we wish to emphasize, is not that as a matter of *fact* the relationship of informal "shop talk" to the business does not exist. It is rather that as a matter of *law* it ought not be given tax significance—or, in the traditional garb in which such a pragmatic judgment of tax policy is clothed, it does not bear to the business the *kind* of relationship that is implied by "ordinary and necessary." Informal talk about one's main preoccupation in life is, in a real sense, a part of life and it ought to be deemed a "personal" rather than a "business" activity.

In concluding our discussion of the deduction issue, it bears repeating that the two questions last discussed—the legal significance of employer "coercion" and of "shop talk"—are not reached in this case if the

findings of fact are affirmed. The district court found that petitioner took the trip, not because of fear of losing his job if he didn't or because of the opportunity to engage in shop talk—nor even because of both of those reasons combined with the training value of the formal morning session—but, plainly and simply, for his own pleasure. Thus whether the former reasons should be characterized as "business" reasons is irrelevant. Even if those reasons were present to a degree, it remains the "primary" or "dominant" reason that controls, and that reason, found by the district court, was pleasure. The cost of a trip undertaken primarily for pleasure is not deductible.

III

THE VALUE OF A TRIP PAID FOR BY AN EMPLOYER PRIMARILY TO CONFER A BENEFIT UPON AN EMPLOYEE IS INCLUDIBLE IN THE EMPLOYEE'S GROSS INCOME

Should the Court decide that the cost of the trip here would have been deductible by petitioner if paid for by him, there would be no need to reach the gross income question since petitioner would in any event be entitled to an offsetting deduction. We have no wish to argue, or have the Court decide, the teasing but here unimportant question whether the proper theoretical treatment of such an item is to exclude it from income in the first place or to "run it through" the taxpayer's income with an offsetting deduction. Accordingly, we confine our discussion here to things provided by an employer for an employee which are of a nature that their cost would not have been

deductible had the employee provided them for himself.

By and large, the deductibility question and the includibility question are opposite sides of a coin and ought to be consistently decided. To deny a deduction to one employee who provides the thing for himself while not taxing another employee on the receipt when his employer provides it for him is a discrepancy conceptually difficult to justify, and its scope ought, therefore, be narrowly confined. Exist it does, however,[18] and we must accordingly deal separately with the income question even if the Court agrees that the cost of the trip would not have been deductible if paid for by petitioner.

1. Petitioner's argument on the income question (Br. 16–27) begins as though he were suggesting that the value of the trip cannot be included in income because of the nature of the receipt—ultimately "psychic" inasmuch as it can be realized only by being consumed and therefore has no *transferable* value. In the end, however, he recognizes that that is too broad an umbrella and that the question must turn, not upon the nature of the receipt, but upon the employer's reasons for conferring it. Thus his initially sweeping proposition is soon confined to benefits in kind "not conferred on an employee as

[18] The primary example is that of the so-called "fringe benefits" which, primarily for pragmatic reasons, have generally not been required to be included in income even though the employee could plainly not deduct the cost if he provided them for himself (*e.g.*, a parking space, incidental medical services, a tie or bottle of whiskey given at Christmas, etc.). See pp. 39–45, *infra*.

compensation" or "conferred by his employer without intent to compensate." (Br. 17); benefits not "intended as compensation" (Br. 20) or the receipt of which is "merely incidental to the dominant business purposes of the employer" (Br. 21); cases where "the underlying objective of the employer is not to compensate the employee but to further the business of the employer" (Br. 23); etc. In turn, he recognizes that "intent" as used here refers, as *Duberstein* teaches, to the "dominant reason that explains his [the employer's] action in making the transfer," and concludes that the question of "vital significance" here is, therefore, the "dominant reason of the Company in paying the convention expenses of Petitioners" (Br. 25). We agree, and thus the real dispute here, as we have previously suggested, is over the question of fact: what was that reason? That question was answered by the district court, which found that the Company's dominant reason for providing the trip was to confer a benefit upon the employees because of their past services (*i.e.*, their meeting of the production quotas). That is precisely what is meant by an "intent to compensate" and, if those findings are not clearly erroneous, that is the end of the case.

2. Despite what seems to be the parties' ultimate agreement about the controlling legal standard, it is appropriate to answer petitioner's initial, though soon abandoned, argument that what must be consumed cannot be taxed, for in dealing with such basic questions as "What is income?" the process of rea-

soning is no less important than the end result in the particular case.

Petitioner derives his thesis primarily from the existence of a class of so-called "fringe benefits" provided by employers the value of which has not generally been considered income to the employees even if the employer's sole reason for providing them is to confer a benefit upon the employees—*e.g.*, provision of parking facilities, medical services, swimming pools, libraries, courtesy discounts, etc. Since there is no express statutory exclusion for such receipts, petitioner contends that the existence of "non-statutory exceptions" to the broad scope of "income" cannot be denied. Seeking to find, from the "nature" of such items, a logical explanation for their exclusion, he then draws the principle that benefits that can be realized only by being consumed are in their nature not "income" within the meaning of § 61(a).

Notwithstanding the broad reach of the gross-income definition as construed by this Court, we recognize, with petitioner, that there may indeed be non-statutory exceptions. We also acknowledge that, by and large, the items mentioned by petitioner, as well as some others, have not generally been held taxable.[17] Our disagreement is over the rationale of

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[17] As petitioner points out (Br. 22), the withholding regulations (Regs., § 31.3401(a)-1(b)(10)) provide:

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as wages subject to withholding if such facilities or privileges are of rela-

their exclusion and with petitioner's attempt to draw from them a universalization about the "nature" of income. We will, accordingly, spell out our view of how income has been defined by this Court and the way in which non-statutory exceptions are to be explained.

3. "Gross income" was defined in § 22(a) of the 1939 Code as including "gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid" and, more generally, "gains or profits and income derived from any source whatever." (The lan-

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tively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment or efficiency of his employees.

A similar exception is recognized by Rev. Rul. 59–58, 1959–1 Cum. Bull. 17, which held that the value of turkeys, hams, or similar merchandise given employees at Christmas or some other appropriate holiday is not income. By slight extension, that would also include other kinds of ritualistic "presents" given in kind, such as a gold watch given an employee after 20 years' service.

An exception of a rather different kind was recognized by this Court in *Commissioner*, v. *Glenshaw Glass Co.*, 348 U.S. 426, 432, n. 8, where the Court referred, without apparent disapproval, to the "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital" (citing rulings including damages not only for physical injuries but also, *e.g.*, for breach of promise to marry). Since under the strict "logic" of the tax law even a return of capital is a "gain" to the extent that it exceeds basis (and an arm or a promise to marry has no basis), those rulings seem ultimately to be "exceptions" to the principle, taken literally, that all "gains" are income. The subject matter of those rulings, we note, is now covered in part (personal injury damages) by the Code (§ 104).

guage was simplified in § 61(a) of the 1954 Code, but with no intended change of substance (see note 19, *infra*).) Despite that sweeping language, and starting with the famous definition in *Eisner* v. *Macomber* which seemed to limit income to "gain derived from capital, from labor, or from both combined" (252 U.S. 189, 207), the courts were burdened for many years with almost metaphysical disputes over the "nature" or "sources" of income. In a course of decisions culminating in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426,[18] however the Court swept away that sterile focus of controversy and gave a new and full recognition to the broad sweep of the statutory definition. By it, the Court concluded, Congress imposed "no limitations as to the source of taxable receipts, nor restrictive labels

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[18] The issue in *Glenshaw Glass* was whether punitive damages received for fraud and antitrust violations were taxable. The taxpayer contended that he was simply the fortuitous beneficiary of a penalty imposed upon the defendant for his culpable conduct to vindicate public policy, and hence that the receipt was essentially a "windfall" to it not within the *Eisner* v. *Macomber* definition of a gain derived from "capital" or "labor." The Court accepted that characterization of the "nature" of the receipt and based its decision broadly on the irrelevance of such conceptual characterizations of the "nature" and "sources" of receipts as the determinants of what is income.

In a companion case, *General Investors Co.* v. *Commissioner*, 348 U.S. 434, the Court held taxable, for the same reason, "insider profits" paid over to a corporation under § 16(b) of the Securities and Exchange Act.

While on their facts both of those cases are far removed from this case, the landmark significance of the opinion in *Glenshaw Glass* derives, as we will show, not from the particular result in that case but from the way in which the Court approached the gross income question.

as to their nature," and meant "to tax all gains except those specifically exempted" (348 U.S. at 429–430).[19] Specifically in the context of benefits conferred by employers or employees, moreover, the broad scope of "income" had already been emphasized in *Commissioner* v. *Smith*, 324 U.S. 177, 181, where the Court had recognized that the term "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." And since *Glenshaw Glass* the Court has repeatedly reaffirmed the virtually all-inclusive scope of "gross income." *E.g.*, *Commissioner* v. *Lo Bue*, 351 U.S. 243, 246; *James* v. *United States*, 366 U.S. 213, 218.

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[19] While the case actually involved § 22(a) of the 1939 Code, the Court noted that § 61(a) of the 1954 Code, though simplified in language, was of the same scope. 348 U.S. at 432. The committee reports on the 1954 Code not only confirm the identity but also confirm the broad interpretation given to the income definition. The Senate committee stated:

> This section corresponds to section 22(a) of the 1939 Code. While the language in existing section 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61(a) is as broad in scope as section 22(a).
>
> Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the sixteenth amendment and the word "income" is used as in section 22(a) in its constitutional sense. It is not intended to change the concept of income that obtains under section 22(a). Therefore, although the section 22(a) phrase "in whatever form paid" has been eliminated, statutory gross income will continue to include income realized in any form. * * *

S. Rep. 1622, 83d Cong., 2d Sess., p. 168; see also H. Rep. 1337, 83d Cong., 2d Sess., p. A18.

Notwithstanding its broad language, however, we acknowledge that, just as this Court in *Glenshaw Glass* said of *Eisner* v. *Macomber* that it was never "meant to provide a touchstone to all future gross income questions" (348 U.S. at 431), so also was *Glenshaw Glass* itself not meant as the final answer to "all future gross income questions." It is too simple a syllogism to say that there was a "gain" of some "nature" or "form"; it is not within a specific statutory exclusion; therefore it is income. Just as it would be unworkable on the deduction side to try to account for every kind of expenditure having a relationship to the business, so also on the income side it is quite impossible to try to account for every kind of receipt. If an employee is given a parking place for which another employee would have to pay, there is no doubt that he has received a benefit from his employer—nor, indeed, that the employer's very purpose in providing the facility may have been to confer such a benefit. The same "logic" that insists that a deduction must be allowed for every business-contributing expenditure would, therefore, equally insist that such a receipt must be taxed as income. The answer here, as there, is not one of logic but of judgment: taxation is a practical matter, and it would be quite senseless, not to say futile, to attempt to require an accounting for every such receipt. The goal is, not the perfect, but the possible, the practical, the workable.

Recognition that there may be non-statutory exceptions to gross income does not, however, deny the

significance of *Glenshaw Glass*. Its significance lies, not in the pronouncement of absolutes, but in its shifting of emphasis and negation of the former criteria. *Eisner* v. *Macomber* had attempted to define income affirmatively, or by inclusion: a gain was not income unless its "nature" brought it within pre-conceived categories. *Glenshaw Glass* reversed the approach and defines income negatively, or by exclusion: a gain is income unless within a recognized exception. Instead of "excluded unless specifically included" we now have "included unless specifically excluded." It is the exclusion, rather than the inclusion, that must be justified; unless there is a sufficient justification (either statutory or as a policy judgment) for excluding the item from income, it is to be included. There is thus put an end to metaphysical disputes over the "nature" or "sources" of income, and the emphasis is placed, where it belongs, on the question whether there are sufficiently strong reasons of tax policy for excluding any particular kind of receipt.

Once *Glenshaw Glass* is read, not in a search for absolutes, but for its refocussing of the relevant criteria, there is, of course, no difficulty in explaining the non-statutory exceptions to income. For the denial in *Glenshaw Glass* that a receipt need not be "derived" from "labor" or "capital" or come within some other pre-conceived category to be income is not a denial of the necessity of accommodating the reach of the statute to the needs of a workable and palatable tax system. In turn, there are more than ample policy justifications for the Commissioner's judg-

ment[20] that the kind of "fringe benefits" to which petitioner refers ought not be included in income: the administrative difficulties of achieving uniform enforcement and thus equality of treatment among taxpayers; the burden upon taxpayers in requiring them to account for such receipts; the relative insubstantiality of the amounts involved; the fact that they are received in kind; the common understanding and attitudes of taxpayers; etc.[21] Such items are not "income," in short, for the simple reason that, as a matter of sound tax policy, it is not sensible to treat them as income.

Petitioner's essential error, therefore—both on the deduction question and the income question—is that he denies the role of pragmatic policy judgments in carving out the scope of what is "ordinary and necessary" and of what is "income" (questions which, as we have emphasized, are essentially opposite sides of

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Needless to say, on a question of that sort (ultimately one of "policy," however clothed) the deference to be paid to the agency primarily charged with the task of administration is necessarily great.

[21] We do not mean to suggest that the room and necessity for the making of such judgments is necessarily limited to considerations of "feasibility." Perhaps even such an imprecise consideration as the "felt" inappropriateness of taxing a particular kind of receipt might justify recognizing an exception. That may, indeed, be the most satisfactory explanation of the rulings cited in *Glenshaw Glass* that compensatory damages for personal injuries are not "income." See note 17, *supra*. It is simply felt to be offensive to tax as income the proceeds of a lost leg or of an injured heart, from which one "infers" that Congress could not have "intended" (or, more accurately, would not have if it had thought about it) to include that particular kind of receipt.

the same coin). He insists rather upon a rule of logic in which the results must turn upon the "nature" of the thing, which is, of course, the very kind of conceptual approach to gross income problems that this Court condemned in *Glenshaw Glass*. The great contribution the Court there made, and which petitioner would have the Court undo, was its recognition that the problem of what is income (and, by equivalence, what is a "business" expense) is, in the end, a practical one to be solved, not by a search for the "nature" of income, but by pragmatic judgments solidly grounded in the needs of a workable and equitable tax system.

4. Quite apart from the basic error in petitioner's approach to the question, the thesis he suggests that what is realized only through consumption is not income is demonstrably unsound (as, indeed, petitioner himself ultimately recognizes by implicitly adding the "if not intended as compensation" qualification).

If a corporation furnishes a house for its president, the rental value of the house is obviously a benefit that the president can realize only in the process of using it. Yet we doubt that anyone will disagree that the rental value of the house ought to be taxable to the president as compensation, and such is the law.[22] Similarly, the value of meals and lodging can be realized only through consumption, yet petitioner

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[22] See *Chandler* v. *Commissioner*, 119 F. 2d 2d 623 (C.A. 3); *Dean* v. *Commissioner*, 187 F. 2d 1019 (C.A. 3); *Heyward* v. *Commissioner*, 36 T.C. 739, appeal pending (C.A. 4). Cf. *Alabama-Georgia Syrup Co.* v. *Commissioner*, 36 T.C. 747, 757–759, 771, 778 (use of company recreational lodge for personal purposes by the company president).

acknowledges (Br. 19–20), as he must, that the necessary implication of the specific statutory exclusion (§ 119) of meals and lodging "furnished for the convenience of the employer" if, "but only if," narrow conditions are met is that the value of meals and lodging not meeting those conditions is includible in income, and the regulations specifically so provide (§ 1.61–2(d)(3)). The contention is answered in even broader terms by § 1.61–1(a) of the regulations, which provides:

> * * * Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash.

Since "services, meals, [and] accommodations" are all things the receipt of which is by consumption, petitioner's thesis that what must be consumed cannot be taxed could be upheld only by invalidating the long-standing [23] regulations.[24]

For a contrary result (though based on the "gift" exclusion rather than the "income" definition), see the decisions of the Fifth Circuit in *Richards* v. *Commissioner*, 111 F. 2d 376 (Judge Sibley dissenting), and *Peacock* v. *Commissioner*, 256 F. 2d 160, holding that the value of a house furnished by a corporation to its president and (with his wife) sole stockholder was a "gift," which suggests this intriguing question: if a corporation can make a "gift" to its *sole* stockholder, what then is a dividend?

[23] The regulations under the 1939 Code were to the same effect. Regs. 118, § 39.22(a)–3.

[24] Petitioner's rationale also, we might point out, fails to account for "fringe benefits" received in the form of transferable property (*i.e.*, not realizable only through consumption), such as the bottle of whiskey given by an employer to his employees at Christmas. See Rev. Rul. 59–58, 1959–1 Cum.

Finally, petitioner's argument is condemned by its own breadth, for its necessary implication is that the tax on compensation could be avoided by a corporation undertaking to provide directly for its employees all their personal and living needs—home, meals, servants, and transportation as well as vacations. That is not and cannot be the law. If a corporation pays for an officer's vacation in Bermuda, doing so solely for purposes of conferring a benefit upon the officer, the result must be, if the tax laws are to have a practical rather than a theoretical operation, that the value of that trip is taxable to the officer as compensation.[23] That is what the district court found here and if those findings are not clearly er-

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Bull. 17. Nontaxability of such receipts cannot be accounted for under the "gift" exclusion, since the "dominant reason" for giving them is likely to be simply to promote employee good will, not "disinterested" generosity or personal "affection" as required by *Duberstein*. They are nontaxable, rather, for the same reason the parking space is nontaxable: not because they must be consumed to be received (not true in the case of the whiskey), but simply because of the pragmatic judgment that it is not feasible to attempt to tax, or require reporting of, such relatively nominal receipts in kind.

[23] There is here, as on the deduction question, the same problem of accounting for mixed motives. As there, the only practical solution, since an allocation is hardly feasible, is to make the "dominant" or "primary" reason controlling, the solution adopted in the regulations and in *Duberstein*. Petitioner also makes the same "compulsion" argument on the income question as on the deduction question, and our answer is the same. If being "required" by an employer to take one's vacation at a restful place, the more vigorously to return to work, is not the kind of "business" reason that ought to be recognized as a basis for deducting the cost of an otherwise "personal" trip, the same policy considerations require that such a trip, when paid for by the employer, be treated as income.

roneous, the value of petitioner's New York trip must be taxed to him as income.[26]

5. There remains a final conundrum: Why, as we and petitioner ultimately agree is the case, should the taxability of an employee's receipt turn upon the employer's reasons for providing it? If an employer sends an employee to Paris for a two-week stay, the benefit to the employee is very likely the same whether the employer's reason for sending him was to have some papers signed or simply to confer a

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[26] Since petitioner had performed services for the Company and the district court found that the trip was given him because of those services, there is no dispute in this case that the receipt is properly to be characterized as "compensation" (§ 61(a)) if it was not taken for independent "business" reasons and if receipts by consumption are not in their "nature" outside the definition of income.

We may note, however, that the receipt also bears the earmarks of a "prize" or "award", which § 74 of the Code (with exceptions not material here) specifically includes in income whether or not services have been performed. That provision was a legislative overturning of such decisions as *Washburn* v. *Commissioner*, 5 T.C. 1333, holding that a $900 "prize" given by a radio show to a person picked at random from a telephone book was not taxable because the recipient had performed no services and hence the receipt had not been "derived" from "labor" or "capital." (The result in that and similar cases was stated in terms of the receipt being a "gift," but the derivation from *Eisner* v. *Macomber* shows that the real basis for decision was that the receipt was a "windfall" not falling within the *Eisner* v. *Macomber* definition of income; the distinction between "windfalls" and "gifts" did not become important until the "windfall" implications of *Eisner* v. *Macomber* were rejected in *Glenshaw Glass*.) See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A27; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 178. As noted above, however, since the trip here was admittedly given for services if it was not for "business" reasons, we have no need to rely on § 74.

benefit upon the employee. Why do we tax the value of the trip in one case and not in the other? The answer to that question—as to all other questions of what is "income" or what is "ordinary and necessary"—is ultimately pragmatic. For reasons cogently stated by petitioner (Br. 17–18, 23, 26), it would be obviously impossible to attempt to measure, as a basis for taxation, the "psychic" pleasure one derives in the course of performing his duties as an employee. Yet when the employer provides the trip, not for independent business reasons, but for the very purpose of conferring a benefit on the employee, the policy considerations point the other way and require that we not permit such a gaping loophole through which the fruits of one's labor may escape taxation.

In doing so, however, we make no pretense that we can measure the employee's psychic pleasure from the "vacation" trip any more than we can his pleasure from the "business" trip. What is taxed is the objective "fair market value" of the trip (Regs., § 1.61-2(d)(1)), and the possibility that it may not have been "worth" that amount to the particular recipient (he would have preferred to have had a smaller sum in cash rather than the trip in kind) we accept as one of the necessary imperfections of, not an ideal, but a workable tax system. Taxing the employee on the "fair market value" of a compensatory trip even though that is more than its true worth to him is, for that matter, simply the counterpart to not taxing him at all on a "business" trip even though, by exactly the same kind of psychic

measurement, it may have a substantial "worth" to the employee.

In justifying the distinction between trips provided by the employer for business reasons and those provided by him for the very purpose of conferring a benefit upon the employee, some comfort can be drawn from the assumption that, by and large, an employer expects to get his money's worth in paying for a trip. Thus, if an employer pays for a trip for the purpose of conferring a benefit upon the employee, he will usually believe that the benefit to the employee will be "worth" the cost. The same assumption cannot be made about a trip for business reasons, however, since the business reasons require the trip even if it is known that it is a burden rather than a boon to the employee. That is, while the question cannot be made to turn upon a factual determination of the subjective "worth" of a trip to an employee in an individual case, the fact that a trip provided by an employer for the purpose of conferring a benefit upon the employee will in *most* cases be worth to the employee its cost to the employer is a more than sufficient justification for a pragmatic rule taxing the employee on the fair market value of pleasure trips in *all* cases. By a parity of reasoning, the fact that trips necessitated by business reasons will in *most* cases be a burden rather than a boon to the employee justifies the pragmatic rule not taxing the employee on the value of business trips in *any* case.

All of the foregoing goes only to prove, as we stated at the outset, that the income question in this case does turn—as petitioner in effect concedes—upon the

single question of fact: was the primary reason why the Company paid for the trip to New York (a) to confer a benefit upon the agents or (b) to further independent business interests of its own? It was precisely that question of fact that was answered by the district court, and its finding, unless clearly erroneous, establishes that the fair market value of the trip was taxable to petitioner.

IV

THE VALUE OF THE WIFE'S TRIP IS TAXABLE EVEN IF THE VALUE OF THE HUSBAND'S IS NOT

If the value of the husband's trip is taxable (*i. e.*, includible in income without an offsetting deduction), it follows *a fortiori* that the value of the wife's trip is taxable.[27] Even if the district court findings as to the reasons for the husband's trip were to be set aside, however, and his trip were held to have been taken for "business" rather than "personal" reasons, his wife's presence on the trip could still not be found to have served any "business" purpose and the value of her trip would nevertheless be taxable.

1. If the husband had paid the wife's expenses, he would not have been entitled to deduct them even if

[27] Since a joint return was filed, it is immaterial whether the value of the wife's trip is deemed income to her in the nature simply of a "gain" not specifically excludible from income (*Glenshaw Glass*, *supra*) or income to the husband in the nature of "compensation." In our view, however, a trip given to a husband and wife as a reward for the husband's performance of services (as was found by the district court to be the case here) is properly to be deemed income "earned" by the husband, and thus includible in his income, notwithstanding that it is paid in part to a natural object of his bounty.

the trip were admittedly a "business" one as to him. The regulations provide (§ 1.162-2(c)):

> Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. * * *

To avoid obvious abuses, that requirement has been vigorously enforced and the wife's expenses have been allowed only in the unusual case where the wife was actually employed as the husband's secretary or in a similar business capacity.[28] Where the wife was not so employed, her expenses have been invariably disallowed,[29] even though she in fact was

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[28] Deductions were allowed in *Thomas* v. *Commissioner*, B.T.A. memorandum decision, March 14, 1939 (1939 P-H B.T.A. Mem. Dec. ¶ 39,112), where the wife of an opera singer, herself a trained opera singer and linguist, was paid a salary for performing necessary business services for which she was qualified by her specialized education, and (though to the corporation rather than to the husband) in *Walkup Drayage & Warehouse Co.* v. *Commissioner*, T.C. memorandum decision, June 25, 1945 (1945 P-H TC. Mem. Dec. ¶ 45,241), where the wife of a corporation president, having been formerly employed as his secretary, accompanied him on a selling trip and devoted a large portion of her time to secretarial work and assisting in the entertainment of customers.

[29] *Silverman* v. *Commissioner*, 253 F. 2d 849 (C.A. 8); *Alabama-Georgia Syrup Co.* v. *Commissioner*, 36 T.C. 747, 754–755, 768–769, 778; *Guglielmetti* v. *Commissioner*, 35 T.C. 668; *Duncan* v. *Commissioner*, 30 T.C. 386; *Moorman* v. *Commissioner*, 26 T.C. 666; *Basse* v. *Commissioner*, 10 T.C. 328; *Faitoute Iron & Steel Co.* v. *Commissioner*, 11 B.T.A. 818.

of considerable assistance to her husband on the trip,[30] serving as his hostess at a convention over which he presided[31] or helping out in the entertainment and solicitation of clients.[32]

Here, whatever may be said of the finding as to the reason for the husband's trip, the evidence conclusively supports the finding that the wife's presence served no business purpose and that she was invited to, and did, participate in the trip solely for her own and her husband's enjoyment. She was not herself engaged in selling insurance, and her generalized interest in her husband's work—not distinguishable from that of any wife—is not enough to convert the alleged educational value of the trip into a "business" reason for her attendance even if, contrary to the findings, it was a "business" reason for her husband's attendance.[33]

The argument that the Company "expected" the wife to attend, that petitioner did not take that ex-

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See also the Tax Court memorandum decisions in *Campbell* v. *Commissioner*, decided June 8, 1961 (1961 P-H T.C. Mem. Dec. ¶ 61,166); *Moser* v. *Commissioner*, decided February 11, 1959 (1959 P-H T.C. Mem. Dec. ¶ 59,025); *Vanderbilt* v. *Commissioner*, decided December 23, 1957 (1957 P-H T.C. Mem. Dec. ¶ 57,235).

[30] *Moorman* v. *Commissioner*, *supra*; *Vanderbilt* v. *Commissioner*, *supra*; *Campbell* v. *Commissioner*, *supra*. See also *Duncan* v. *Commissioner*, *supra*, where the wife managed a portion of the business at home.

[31] *Sheldon* v. *Commissioner*, decided February 19, 1962 (C.A. 7), 9 A.F.T.R. 2d 782.

[32] *Moser* v. *Commissioner*, *supra*.

[33] See Rev. Rul. 55-57, 1955-1 Cum. Bull. 315; Rev. Rul. 56-168, 1956-1 Cum. Bull. 93.

pectation "lightly", and that petitioner was therefore acting in response to the Company's "command" in taking his wife (Br. 45), is of even less force here than in the husband's case. Its factual premise is destroyed by petitioner's own admission that "I could have gone, yes, without her going" (R. 40). Its legal premise reveals the sweep of petitioner's but-for reasoning. If an employer, perceiving the importance of a wife's moral support to her husband's success, wants its employees' wives brought "into the Company family" (Br. 45) and fears that in their absence their husband's business trips might "degenerate into stag affairs" (R. 53), the husband's taking of his wife with him on trips in compliance with the company policy becomes *ipso facto* a "business" function. It might as well be said that the cost of supporting a wife at home is deductible if an employer, thinking married men more stable or more strongly motivated than bachelors, has a "policy" of hiring or retaining in employment only married men. The contribution of a wife's presence to either the morale or the morality of the employee, which we do not deny may exist as a matter of fact, is not as matter of law the kind of relationship to the "business" that should be deemed to qualify her expenses as "ordinary" business expenses, however "necessary" (because of company "policy") they may be. All wives help their husbands to a degree, and the necessities of practical tax administration require that some more formal or direct kind of relationship to the business exist to warrant deduction of the wife's expenses.

2. It is not challenged by petitioner that if the wife's presence was not necessitated by what are to be recognized as "ordinary or necessary" business reasons, the value of her trip paid for by the Company is includible in gross income. In any event, as we have shown in the discussion of the husband's trip, the same reasons that would prevent the husband from deducting the cost of the trip if borne by him equally require that the value of the trip, when paid for by the employer, be taxed as income.

CONCLUSION

The Court presumably granted certiorari in this case, not simply to review the district court's findings of fact, but because of a belief that there were involved questions of law going to the definition of "income" and "ordinary and necessary" business expenses." For that reason, we have thought it appropriate in this brief to answer fully the suggestions in petitioner's brief which raise, even tentatively, such questions of definition—*e.g.*, the suggestions that what must be consumed cannot be "income" and that expenses that are essential in a but-for sense to keeping one's job are *per se* "ordinary and necessary." In the end, however, we do not believe there is any basic disagreement between the parties over the questions of definition—or at least none that is relevant to the facts of this case as found by the district court.

" The "Questions Presented" as stated in the petition for certiorari, we may note, do indeed seem to raise such questions. Upon close examination, however, it will be found that each of them assumes facts contrary to those found by the district court.

Although petitioner initially suggests sweeping doctrines of the nature of income and of business expenses, he ultimately abandons them and acknowledges that both questions turn upon the reasons why the Company provided and petitioner took the trip. Thus, the suggestion that receipts in the form of the use of services or facilities are not income is soon qualified by adding: if "the underlying objective of the employer is not to compensate the employee" (Br. 23). The suggestion that anything the employer commands the employee may deduct is, similarly, soon limited to commands reflecting a "purposeful business decision" (Br. 42) or made by the employer "for its own legitimate business reasons" (Br. 45) or to expenses which the employees incur "not only because of the implied command but also because their own business is furthered" (Br. 43). Finally, all pretense that a question of law is presented is abandoned by petitioner's express acknowledgment that the "ultimate issue", on the deduction side, "is the dominant motive and purpose of the Petitioners in attending the convention"—"Did they attend primarily for reasons of business or personal pleasure?" (Br. 36)—and, on the income side, the "dominant reason of the Company in paying the convention expenses"—a purpose "to compensate" or "other valid business reasons"? (Br. 24–25).

The questions of fact stated by petitioner to be controlling are precisely those answered, adversely to him, by the district court, which found that the primary reason the Company paid for, and petitioner ac-

cepted, the trip was, not any of the debatably "business" reasons for which petitioner contends, but purely and simply the "pleasure" it would afford petitioner and his wife. By petitioner's own statement of the controlling legal standards, therefore, the trip was taxable to him if those findings are not "clearly erroneous." It follows that the only question actually presented by this case is whether the district court's findings of the admittedly controlling facts (the reasons for the trip) are "clearly erroneous." Unless those findings are first set aside, there is no occasion for the Court to consider or comment upon the questions of definition latent in petitioner's view of the facts and to which the bulk of this brief has been directed.

If the Court agrees with our analysis that the case ultimately presents, not a disputed question of the definition of "income" and "ordinary and necessary" business expenses—as suggested by the petition for certiorari—but instead only a challenge to the district court's findings of the admittedly controlling facts, the case may be simply disposed of. The findings were affirmed by the court of appeals, and even in a review on the merits the concurrent findings of two lower courts are normally accepted by this Court in the absence of a very exceptional showing of error. *Comstock* v. *Group of Investors,* 335 U.S. 211. At the very least, no such showing of "exceptional" error has been made here, and thus the Court need not even undertake an independent examination of the evi-

dence. To affirm the judgment below, in short, the Court need decide no more than the following:

> (1) the district court found as a fact that the primary reason why the Company provided the trip was to confer a benefit upon the petitioner because of his past services (in this instance, selling prescribed amounts of insurance) and that the primary reason petitioner took the trip was, in turn, for personal pleasure;
>
> (2) the value of a trip given by an employer and taken by an employee for those reasons is, as petitioner does not ultimately dispute, includible in the employee's income without an offsetting deduction; and
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> (3) the question whether the particular findings of fact are clearly erroneous, which now appears to be the only question in dispute between the parties, is, under the two-court rule, not open here in the absence of an exceptional showing of error, a showing that petitioner has failed to make (or, alternatively, the findings are in fact not clearly erroneous).[35]

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[35] For much the same reasons, the pending motion for leave to file an out-of-time petition for rehearing of the denial of certiorari (368 U.S. 837) in *Patterson* v. *Thomas*, No. 109, this Term, should also be denied. Although the court of appeals in that case set aside the district court findings as being "clearly erroneous," it expressly acknowledged the limitations on its scope of review under *Duberstein*, and reversed the findings only after painstakingly cataloguing all of the evidence and concluding that, giving due weight to the findings, it was nevertheless "left with the definite and firm conviction that a mistake has been committed" (quoting *Duberstein*, 363 U.S. at 291). On the facts of that case that conclusion was, we believe, correct. The convention pattern in *Thomas* was remarkably similar in many respects to that here: in addition,

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

JOHN B. JONES, JR.,
I. HENRY KUTZ,
NORMAN H. WOLFE,
Attorneys.

MARCH 1962.

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however, the convention participants in that case did not travel together, so that not even the claim made here that the travel time afforded an opportunity for informal "business" interchanges was available. So long as the court applied the proper standards of review, however—which it clearly did—the question whether, in doing so, it reached the right result on the particular record is not a question warranting review by this Court. Indeed, even in a case here on the merits, this Court has said that if the court of appeals, in setting aside a finding as clearly erroneous, "has made a fair assessment of the record * * *, this Court will not intervene" but will accept the court of appeals' determination, *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61.

APPENDIX

A. Internal Revenue Code of 1954 (26 U.S.C.)

Sec. 61. Gross Income Defined.—(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * * *

Sec. 161. Allowance of Deductions.—In computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

Sec. 162. Trade or Business Expenses.—(a) *In general.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken

or is not taking title or in which he has no equity.

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SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.—Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

B. TREASURY REGULATIONS ON INCOME TAXES (1954 CODE)

SEC. 1.61-1. GROSS INCOME.—(a) *General definition.*—Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. * * *

* * * * *

SEC. 1.61-2 COMPENSATION FOR SERVICES * * * (d) *Compensation paid other than in cash.*—(1) *In general.*—If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income. If the services were rendered at a stipulated price, such price will be presumed to be the fair market value of the compensation received, in the absence of evidence to the contrary.

* * * * *

(3) *Meals and living quarters.*—The value of living quarters or meals which an employee receives in addition to his salary constitutes gross income unless they are furnished for the convenience of the employer and meet the conditions specified in section 119 and the regulations thereunder. For the treatment of rental value of parsonages or rental allowance paid to ministers, see section 107 and the regulations thereunder; for the treatment of statutory subsistence

allowances received by police, see section 120 and the regulations thereunder.

* * * * *

SEC. 1.162-1 BUSINESS EXPENSES.—(a) *In general.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business * * *. Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles * * * [and] traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.162-2) * * *.

* * * * *

SEC. 1.162-2. TRAVELING EXPENSES.—(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incident to travel, are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

(b)(1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in busi-

ness activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

(2) Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary.

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

(d) Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that

he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * * * *

SEC. 1.262–1. PERSONAL, LIVING, AND FAMILY EXPENSES.—(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * * * *

(3) Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense.

* * * * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, § 1.162–2, and paragraph (d) of § 1.162–5 (relating to trade or business expenses) * * *. The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses

Except as permitted under section 162 or 212, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

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U.S. GOVERNMENT PRINTING OFFICE: 1983